78-1189

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

THOMAS H. FADDEN, Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

HENRY P. SORETT
51 Brattle Street
Harvard Square
Cambridge, Massachusetts
02138

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CITATIONS

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No._____

THOMAS H. FADDEN, Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS, Respondent

Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts

Petitioner, Thomas H. Fadden, prays that a writ of certiorari be granted to review the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts in Thomas H. Fadden v. Commonwealth entered on December 22, 1978.

OPINION BELOW

The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts,

announced on November 13, 1978, is unofficially reported in 1978 A.S. 2830, and is printed at Appendix 9-22.

JURISDICTION

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered on December 22, 1978, (printed at Appendix 23-24.)

Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Does the protection against Double Jeopardy bar a trial de novo of a charge of vehicular homicide, by means specified, when, in a prior trial before the first tier court, a court of competent jurisdiction, a charge of vehicular homicide, involving the death of same victim, at the same time and place, by other means specified, had been dismissed after jeopardy attached without the consent of the defendant, where as a matter of state law, homicide by motor vehicle, by whatever means, is one offense?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case involves Massachusetts General Law ch. 90, § 24G (Reprinted at Appendix 1) and Amendments V and XIV of the United States Constitution.

STATEMENT OF THE CASE

Petitioner seeks review of the final judgment of the Supreme Judicial Court of Massachusetts which declared that

> "...the proceedings in the District Court [did] not bar further prosecution of the Defendant in the Superior Court Department on a complaint for motor vehicle homicide by negligently operating to endanger." [Judgment, Appendix 23.]

This case began with the issuance of two complaints by the Massachusetts District Court, a first tier court, in a two tier criminal justice system. Each complaint charged Petitioner with causing the death of the same victim by operating a motor vehicle in violation of Mass. Gen. Laws ch. 90, § 24G.: The first that he

caused the death by operating the vehicle negligently so that the lives and safety of the public might be endangered; the second that he caused the same death by operating under the influence of intoxicating liquor.

Petitioner filed a pretrial motion in the District Court to dismiss on grounds that the complaints were duplicitous and that simultaneous trial would violate the Double Jeopardy Clause. This motion was not allowed.

Petitioner was tried on both complaints simultaneously. After a lengthy trial in the District Court, one of the complaints for homicide by motor vehicle was dismissed by order of the Court and Petitioner was found guilty of the other (Stipulation as to Motion to Dismiss, Appendix 6).

Petitioner claimed a trial de novo, pursuant to General Laws ch. 278 §§ 2 and 18, in the Superior Court, on the complaint on which he was convicted. There, he filed a motion to dismiss that complaint on the grounds of Double Jeopardy. His motion was denied. He then sought redress in the Supreme Judicial

Court by filing a civil complaint seeking declaratory and injunctive relief. Mass. Gen. Laws ch. 211 § 3, ch. 231A. The case was heard on the pleadings and on the basis of facts stipulated. (Stipulation, Appendix 2-7).

The Supreme Judicial Court, acknowledging that Petitioner presented "...a Double Jeopardy Claim of substantial merit..." (Opinion, Appendix 12) granted review of the claim, under its superintendence power, but denied relief on the merits.

REASONS FOR GRANTING THE WRIT

The judgment of the Supreme Judicial Court of Massachusetts permitting a second trial, in a two-tiered criminal justice system, of the offense of homicide by motor vehicle, when a prior prosecution for the same offense terminated in his favor after jeopardy attached, is contrary to the requirements of the Double Jeopardy Clause. This decision is also contrary to this Court's decision in Sanabria v. United States, 437 U.S. 54 (1978).

A. Massachusetts General Laws Ch. 90 § 24G creates a single offense.

In its opinion, the Supreme Judicial Court held that Mass. Gen. Laws ch. 90 § 24G created one offense which could be committed in several ways that could have been included within the compass of a single complaint, and that a defendant could be convicted upon proof of any one or of all the means by which the offense could be committed. In the event of conviction on more than one theory, a defendant could not be given consecutive sentences. (Opinion, Appendix 18-19). This determination of state law is final and binding.

Although the Double Jeopardy Clause imposes few, if any limitations on the legislative power to define offenses, once the legislature has defined a statutory offense

> "...by its prescription of the 'allowable unit of prosecution' [cites omitted] that prescription determines the scope of protection afforded by a prior conviction or acquittal." Sanabria v. United States, supra, 69-70.

The "allowable unit of presecution" in the present case is the offense of homicide by motor vehicle.

B. Jeopardy attached as soon as the District Court began to hear evidence.

Jeopardy attaches as soon as the trier of fact, judge or jury, begins to hear evidence on the merits. United States v. Jorn, 400 U.S. 470, 479 (1971). The Commonwealth did not contest that jeopardy attached to the complaint which alleged vehicular homicide while operating under the influence of intoxicating liquor.[1] (Opinion, Appendix 20-21).

The question presented in the particular circumstances of this case is what effect that particular judgment of dismissal, tantamount to an acquittal, should now have on the subsequent trial of

[1]The dismissal of the complaint alleging motor vehicular homicide while under the influence was not entered as a functional equivalent of a mistrial for manifest necessity and in no sense, contemplated a reprosecution on that complaint. See Lee v. United States, 432, U.S. 23, 30-31 (1977).

a charge alleging the same offense, but by different means.

The proceedings in the District Court are significant in determining the precise scope of the protection afforded by the Double Jeopardy Clause.

> "Legal consequences ordinarily flow from what has actually happened, not from what a party might have done from the vantage of hindsight. The precise manner in which (complaints are) drawn cannot be ignored, because an important function of the (complaints are) to ensure that, 'in case any other proceedings are taken against [the defendant] for a similar offense...the record [will] show with accuracy to what extent he may plead a former acquittal or conviction.' [cites omitted]." Sanabria v. United States, 437 U.S. 54, 65-66. (parantheses inserted, brackets by the Court.)

Petitioner raised, in timely fashion, his objection on grounds of duplicity and double jeopardy to being tried before the District Court on the two separate com-

plaints charging vehicular homicide. (Stipulation, Appendix 3-4). Petitioner's objections were opposed by the Commonwealth, and were not allowed by the District Court. Although the Court, sua sponte, or on motion by the Commonwealth, might have consolidated the complaints, or amended them, or dismissed one prior to trial, neither the Court nor the Commonwealth acted. Instead, the Petitioner was tried on both complaints on the Commonwealth's motion.

Here, Petitioner did place the Commonwealth on notice as to the legal consequences of its acts. See Jeffers v. United States, 432 U.S. 137, 160 (1977) (Stevens, dissenting). The Commonwealth acted - or more accurately, given knowledge of the two-tier procedural context in which District Court trials occur, - refused to act in response to Petitioner's motions.[2]

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[2]Although since modified in some respects, the two-tier system in the Commonwealth of Massachusetts has been upheld by this Court, Ludwig v. Massachusetts, 427 U.S. 618 (1976) as not in violation with Amendments V,VI or XIV of the United States Constitution. The modifications do not effect the issue raised in this case.

The fact that Petitioner now faces successive prosecutions for the same offense is attributable, therefore, to the conduct of the Prosecution, not to any tactical moves or elections by Petitioner which might be construed as a waiver of his protection against being twice placed in jeopardy. See Jeffers v. United States, supra, 154.

Following trial, dismissal without Petitioner's consent of one complaint, and conviction on the other charging the same offense, Petitioner exercised his "...absolute right to have his guilt determined by a jury composed and operating in accordance with the Constitution..." Ludwig v. Massachusetts, 427 U.S. 618, 625 (1976), and proceeded to the Superior Court, the second tier court, for a jury trial of the complaint on which he was convicted. The exercise of that right can hardly be absolute if it were to absolve the Commonwealth of the consequences of its own determination to seek the District Court trial simultaneously on two separate, distinct complaints, each charging the same offense. Otherwise, a defendant, in such circumstances, would

face a constitutionally impermissible Hobson's choice between two vital Constitutional guarantees, between the right to trial by jury, and the right to be free from successive prosecutions. See Simmons v. United States, 390 U.S. 377, 389-394 (1968) Jeffers v. United States, supra, at 153 fn. 21.

C. Dismissal, in the first tier, without Petitioner's consent, was not an implementation of either a judicial policy or a Constitutional mandate against duplicitous sentences.

The Supreme Judicial Court improperly separated the concepts of double jeopardy and duplicitous sentencing in its opinion. While its analysis of the law pertaining to duplicitous sentencing is substantially correct, its characterization of the proceedings in the first tier is speculative and its conclusion is a logical non sequitur. The Court stated that

> "...it was clearly within the power of the District Court Judge to anticipate what this court would do in

> the event of duplicitous sentences: dismiss one charge and affirm the sentence on the other. E.g. Kuklis v. Commonwealth, 361 Mass 302, 309 (1972). By dismissing one charge and sentencing the Defendant on the other, the judge accomplished exactly the same result. There were neither successive prosecutions nor multiple punishments." (Opinion, Appendix 21).

The avoidance of duplicitous sentences is constitutionally required as has been recognized by the Supreme Judicial Court elsewhere. Gallinaro v. Commonwealth, 362 Mass. 728, 735 (1973).

The Massachusetts Court failed, however, to recognize the co-terminous scope of protection under the Double Jeopardy Clause as between successive prosecutions and multiple punishments. This Court has stated:

> "The Double Jeopardy Clause is no less offended because the Government...seeks to try petitioner twice for this single offense, instead of seeking to punish him twice as it did in Braverman.

[footnote omitted] 'If two offenses are the same for the purposes of barring consecutive sentences at a single trial, they will necessarily be the same for purposes of barring successive prosecutions.'" Brown v. Ohio, supra, 432 U.S. [161] at 166, Sanabria v. United States, supra, 74.

Just as Petitioner could not have been subjected to consecutive punishments on each of the complaints alleging the same offense, no matter in which court the complaints were heard, so too he cannot be retried in the second tier court for an offense which a first tier court, a court of competent jurisdiction, had already dismissed, after a hearing on the merits and attachment of jeopardy.

The Massachusetts Court's reference to a first tier court judge's power to "anticipate" a Supreme Judicial Court action implies, at best, a speculative interpretation of what actually happened and has no support in the record. The record is clear that whatever the first tier court judge may have had in his mind, the discussion between the prosecuting attorney and the defense counsel went

to the question of the factual determination of guilt or innocence under the complaints, based on the evidence presented to the court. (Stipulation, Appendix 5-6). Argument with respect to sentencing at a point in the trial when the merits are at issue would be inappropriate.

The first tier court, significantly, did not enter guilty findings on both charges, and then impose concurrent sentences, a situation where the Supreme Judicial Court has declined to rule on claims of duplicity (Opinion, Appendix 19-20). Had it done so, appeal to trial de novo, the only method of correcting first tier errors of law, would have mooted a claim of duplicity. No appeal, however, lies from the dismissed complaint. The judgment of dismissal was, in effect, an acquittal on the merits.

Finally, there is no issue that at the first tier level there were "...successive prosecutions or multiple punishments." The issue in this case is whether there may constitutionally now be a second prosecution of Petitioner. There may not be. Abney v. United States,

431 U.S. 651 (1977). The Commonwealth elected to try the Petitioner on two distinct complaints charging the Petitioner with the same offense, and must now accept the consequences of a termination in Petitioner's favor on one of the complaints.

Petitioner submits that the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution prohibits the Commonwealth of Massachusetts from retrying him for the same offense.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certorari should be granted.

Thomas H. Fadden, Jr.
by his attorney,

Henry P. Sorett
51 Brattle Street
Harvard Square
Cambridge, Massachusetts
02138
(617) 868-5872

with him:
Martin C. Gideonse, Esq.
of the Massachusetts Bar
51 Brattle Street
Harvard Square
Cambridge, Massachusetts
02138
(617) 868-5872

APPENDIX TO WRIT OF CERTIORARI

INDEX TO APPENDIX

MASSACHUSETTS GENERAL LAWS ch. 90 §24G

§ 24G. Homicide by a motor vehicle; punishment

Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle in violation of paragraph (a) of subdivision (1) of section twenty-four of chapter ninety, or so operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered, and by any such operation so described causes the death of another person shall be guilty of homicide by a motor vehicle and shall be punished...

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Superior Court
Criminal Nos.
77-704, 07

COMMONWEALTH

VS

THOMAS H. FADDEN, JR.

STIPULATION AS TO MOTION TO DISMISS

With regard to the Defendant's Motion to Dismiss on the grounds of double jeopardy the Defendant and the Commonwealth stipulate that the following facts are true:

1. On October 23, 1976 the Commonwealth applied for and the Court issued a complaint against the Defendant alleging that on that date the Defendant violated G.L. c. 90 § 24G by causing the death of one Hope Frazier by operating his motor vehicle negligently so that the lives and safety of the public might be endangered. Additional complaints

issued at the same time and arising out of the same incident, charged the Defendant with speeding, driving to endanger, and operating a motor vehicle under the influence of alcohol;

2. On December 8, 1976 the Commonwealth applied for and the Court issued a complaint against the Defendant alleging that on October 23, 1976 the Defendant violated G.L. c. 90 § 24G by causing the death of the same Hope Frazier by operating his motor vehicle while under the influence of intoxicating liquor;

3. The Defendant promptly moved to dismiss the complaint issued on December 8, 1976 on the grounds that: a) the complaints were duplicitous, and b) it would violate the double jeopardy clause of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, to try him simultaneously on both complaints;

4. At the hearing on the motion to dismiss in the District Court, the Court, Bailey, J., asked the Assistant District Attorney if it was the

Commonwealth's position that the Defendant could be convicted on both complaints. Without receiving an answer, the Court then asked if the Commonwealth wished to amend one of the complaints to include both theories. The Assistant District Attorney replied that in the alternative, if the Court decided that the two complaints were duplicitous, the Commonwealth would then move to amend either of the complaints so as to include both theories in one complaint. In its brief, the Commonwealth stated that while it could try the Defendant on both complaints simultaneously, the [sic] could only be found guilty on one.

5. On February 10, the Commonwealth moved for trial on both complaints alleging homicide by motor vehicle. On February 10 and 11, 1977 the Defendant was tried simultaneously on both complaints alleging that he caused the death of Hope Frazier on October 23, 1976 by operation of his motor vehicle. During closing argument, the following colloquy took

place:

Miss Vidockler:

So based on that Your Honor, the Commonwealth would like a finding of guilty on negligent manslaughter under the theory that he was driving under the influence at the time of the accident. The Commonwealth is also seeking a finding of guilty on the charges of driving so as to endanger, driving under the influence, and overspeeding. Thank you, Your Honor.

Mr. Sorette: [sic]

Do I understand the Commonwealth not to be asking for a finding of guilty on the charge of driving negligently so as to endanger and thereby causing death? If that is the Commonwealth's request, I would ask that a finding of not guilty be entered on at this time.

The Court:

Do you want to be heard, Miss Vidockler?

Miss Vidockler:

The Commonwealth is leaving it up to the Judge on that issue and the Judge

is the factfinder in this case.
Thank you.
After trial, the Court ordered complaint #7603, issued on December 8, 1976, dismissed and found the Defendant guilty on complaint #6710, issued on October 23, 1976, as well as the additional complaints described in paragraph #1, supra, from which convictions he claimed a prompt appeal;
6. In the Superior Court, the Defendant moved to dismiss the complaint alleging that he violated G.L. c. 90 § 24G by causing the death of Hope Frazier by operation of his motor vehicle on October 23, 1976 on the grounds that he had previously been placed in jeopardy for the same offense.

THOMAS H. FADDEN, JR.
by his attorney,

Henry P. Sorett (s)

Henry P. Sorett
51 Brattle Street
Harvard Square
Cambridge, Massachusetts
868-5872

COMMONWEALTH OF MASSACHUSETTS
by its attorney,

Karen B. Meagher (s)
ASSISTANT DISTRICT ATTORNEY
FOR MIDDLESEX COUNTY

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

At Boston, November 13, 197

IN THE CASE OF 1315

THOMAS H. FADDEN, JR.

VS.

COMMONWEALTH

pending in the Appeals Court for the County of Suffolk No. 77-0300-Civ

ORDERED, that the following entry be made in the docket; viz.,--

The motion of the judges of the Superior Court to dismiss the action as to them is allowed. The case is to be treated as a proceeding against the Commonwealth. The judgment of dismissal entered by the single justice of the Appeals Court is vacated. The case is remanded to the Supreme Judicial Court for the county of Suffolk, where a judgment is to be entered declaring that the proceedings in the District Court do not bar further prosecution of the defendant in the Superior Court Department on the

complaint for motor vehicle homicide by negligently operating to endanger.

BY THE COURT,

Frederick J. Quinlan, CLERK.

Nov. 13, 1978

BRIEF STATEMENT OF THE GROUNDS AND REASONS OF THE DECISION:

See opinion on file.

S-1315 S.J.C.

THOMAS H. FADDEN, JR. vs. COMMONWEALTH.

BRAUCHER, J. Two complaints were issued, each charging Fadden (the defendant) with causing the death of the same victim by operating a motor vehicle, in violation of G.L. c. 90, § 24G. The first charged that he operated the vehicle negligently so that the lives and safety of the public might be endangered; the second charged that he operated it while under the influence of intoxicating liquor. After trial in a District Court he was convicted on the first complaint and the second complaint was dismissed. He appealed to the Superior Court, and now

seeks dismissal of the first complaint on the ground of double jeopardy. We uphold the procedure followed in presenting the issue, but deny on the merits the relief sought by the defendant. We order that the rights of the parties be declared accordingly.

The present civil action was brought by the defendant in this court for the county of Suffolk, and was transferred to the Appeals Court by a single justice of this court under G.L. c. 211, § 4A, and Appeals Court Rule 2:10, as amended, 3 Mass. App. Ct. (1975). A single justice of that court dismissed the complaint, and the defendant appealed to a panel of the Appeals Court. We transferred the case to this court on our own motion.

The following facts appear from the pleadings and stipulation of the parties. On October 23, 1976, the Third District Court of Eastern Middlesex issued four criminal complaints against the defendant, arising out of the same incident on that date. He was charged with homicide by motor vehicle by negligently operating to

endanger, and with operating a motor vehicle under the influence of alcohol. Later he was charged in a fifth complaint with homicide by motor vehicle by operating while under the influence of intoxicating liquor. He moved to dismiss the fifth complaint as duplicitous and as violative of the constitutional prohibition of double jeopardy. On February 11, 1977, after trial on all five complaints, the judge ordered the fifth complaint dismissed and found the defendant guilty on the other four complaints.

The defendant appealed to the Superior Court from the four convictions, and there moved to dismiss the remaining complaint for homicide by motor vehicle on the ground that he had previously been placed in jeopardy for the same offense. The motion was denied, and the defendant began the present action.

1. The remedy. The defendant framed his complaint in the present action as an application for injunctive relief pursuant to our power of general superintendence under G.L. c. 211, § 3, and for declaratory relief under G.L. c. 231A. We have recently held that a criminal defendant

who presents a double jeopardy claim of substantial merit is entitled to review of that claim before the second trial "under our general superintendence power." Costarelli v. Commonwealth, Mass. , (1978).[a] That case governs this one, and no other issue of appellate procedure is argued to us. Nevertheless, we think some clarification of the roles of this court and the Appeals Court in such cases is appropriate.

In the present case the single justice of this court might have exercised the power of general superintendence by deciding the case, or he might have reported it to the full court. Instead, he transferred the case to a single justice of the Appeals Court. The single justice of the Appeals Court did not have the benefit of our holding in the Costarelli case, and he ruled that the plaintiff could not circumvent the usual avenue of appellate relief after trial.

Years ago this court upheld the dismissal of a petition for a writ of prohibition in a similar case. Cronin v.

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[a] Mass. Adv. Sh. (1978) 734, 737.

Superior Court, 253 Mass. 182, 184 (1925). So far as that decision reflected a view that review of a claim of double jeopardy must be deferred until after trial and conviction, it has been superseded by the Costarelli case. Once it is decided to allow interlocutory review in a particular case, however, a civil action in the nature of prohibition now seems to be an appropriate mode of proceeding. See Mass. R. Civ. P. 81 (b), 365 Mass. 841 (1974), abolishing writs of prohibition and providing for civil actions seeking relief formerly available under such writs. Courts in other jurisdictions have held that the writ of prohibition or its statutory successor is the proper procedure for interlocutory review of a double jeopardy claim. Cardenas v. Superior Court of Los Angeles County, 56 Cal. 2d 273, 275 (1961). Abraham v. Supreme Court of Bronx County, 37 N.Y. 2d 560, 564 (1975).

Section 4A of G.L. c. 211, as appearing in St. 1972, c. 740, § 2, permitted a single justice of this court to transfer to a lower court any case or matter which might otherwise be disposed

of by the single justice, with stated exceptions. One of those exceptions forbade transfer to any court other than the Appeals Court of "writs of prohibition, or of mandamus to any court other than the supreme judicial court or the appeals court or to a judicial officer thereof." The quoted language was deleted by St. 1973, c. 1114, § 46, effective July 1, 1974, the effective date of Mass. R. Civ. P. 81 (b), and a reference to G.L. c. 249, § 5, relating to civil actions to obtain relief formerly available by mandamus, was substituted. We read the 1973 statute and the 1974 rule as affecting forms of procedure but not the jurisdiction or powers of this court with respect to actions in the nature of mandamus or prohibition. Thus a civil action in the nature of prohibition may still be brought in this court. See Washburn v. Phillips, 2 Met. 296, 298-299 (1841). If the action seeks relief from a proceeding in any court other than this court or the Appeals Court, it may be transferred to the Appeals Court under G.L. c. 211, 4A.

We do not regard it as appropriate to delegate our power of general superintendence to the Appeals Court or to a justice of that court. In a number of cases a single justice of this court has first denied relief under G.L. c. 211, § 3, and then transferred the case to the Appeals Court. We think the single justice of this court may in a proper case exercise the power of general superintendence by allowing interlocutory review of a double jeopardy claim of substantial merit and then transfer the case to a single justice of the Appeals Court for decision on the merits of the double jeopardy claim. Compare the statutory procedure for interlocutory appeals under G.L. c. 278, § 28E. Alternatively, he may treat the case as an action to obtain relief formerly available by writ of prohibition and transfer it to a single justice of the Appeals Court for evaluation and decision. Where appellate review of a final judgment is entrusted to the Appeals Court, and interlocutory review of a ruling in the case is appropriate, transfer of the interlocutory review to that court may contribute to an orderly and expeditious disposition.

2. Parties. The defendant named the

district attorney and the judges of the Superior Court as parties defendant in his action in this court. The judges moved to dismiss the complaint. In the brief filed on their behalf, the Attorney General argues that to require the judges to participate in an action of this kind is inappropriate. The naming of judicial defendants as parties follows some of our precedents. See, e.g., Kennedy v. District Court of Dukes County, 356 Mass. 367 (1969) (writ of certiorari); Cronin v. Superior Court, 253 Mass. 182 (1925) (writ of prohibition). A district attorney was named as a defendant in Blaikie v. District Attorney for Suffolk County, Mass. (1978) [b] (mandamus), New England Tel. & Tel. Co. v. District Attorney for the Norfolk Dist., Mass. (1978) [c] (declaratory judgment), and P.B.I.C., Inc. v. District Attorney of Suffolk County, 357 Mass. 770 (1970) (suit for injunction). It is more appropriate, where a plaintiff questions the

[b] Mass. Adv. Sh. (1978) 1848.

[c] Mass. Adv. Sh. (1978) 588.

action of a judge in his official capacity, that the proceeding run against the court on which the judge serves, rather than against the judges of that court. Costarelli v. Municipal Court of the City of Boston, 367 Mass. 35 n.1 (1975). Where the true adverse party is not the judicial defendant but the adverse party in an underlying proceeding, the judicial defendant has been designated a nominal party. See Soja v. T.P. Sampson Co., Mass. , n.2. (1977). [d] In the instant case, as in Costarelli v. Commonwealth, Mass. (1978), [e] the defendant seeks interlocutory review of the denial of a motion to dismiss a criminal prosecution on grounds of double jeopardy. See also Thames v. Commonwealth, 365 Mass. 477 (1974). It is clear that the Commonwealth, and not the Superior Court or its judges, is the adverse party, as in the Costarelli and Thames cases, and we so treat it. The district attorney is counsel rather than a party.

3. Duplicitous complaints and double

[d] Mass. Adv. Sh. (1977) 2327, 2330 n.2.

[e] Mass. Adv. Sh. (1978) 734.

jeopardy. Under G.L. c. 90, §24G,[1] homicide by motor vehicle may be committed in any one of several ways. One is by negligently operating to endanger; another is by operating under the influence of intoxicating liquor. These two ways are different, but not mutually exclusive. Thus the defendant could have been charged with both in a single complaint, and he

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[1] As inserted by St. 1976, c. 227: "Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle in violation of paragraph (a) of subdivision (1) of section twenty-four of chapter ninety, or so operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered, and by any such operation so described causes the death of another person shall be guilty of homicide by a motor vehicle and shall be punished . . ."

General Laws c. 90, § 24 (1) (a), as amended through St. 1971, c. 1071 § 4: "Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees, operates a motor vehicle while under the influence of intoxicating liquor, . . .shall be punished . . . ."

could have been convicted on proof of either or both. Commonwealth v. Dowe, 315 Mass. 217, 219-220 (1943), and cases cited. The Commonwealth could not have been required to choose between the two charges unless it was necessary for the protection of the substantial rights of the defendant. See Commonwealth v. Slavski, 245 Mass. 405, 411-413 (1923). After a conviction on both charges and appeal to the Superior Court, the case could have been retried on both.

Instead, the charges were separated into two complaints. The separation should not be allowed to prejudice the defendant. He could not be given consecutive sentences on duplicitous charges. Kuklis v. Commonwealth, 361 Mass. 302, 307-309 (1972). Commonwealth v. White (No. 2), 365 Mass. 307, 311 (1974), cert. denied, 419 U.S. 1111 (1975). Commonwealth v. Coburn, 5 Mass. App. Ct. , (1977).[f] Commonwealth v. Xiarhos, 2 Mass. App. Ct. 225, 227-228 (1974). Where the sentences are concur-

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[f] Mass. App. Ct. Adv. Sh. (1977) 256, 257-258.

rent, on the other hand, we have refused to rule on claims of duplicity. Commonwealth v. Grasso, Mass. , (1978).[g] Commonwealth v. Berryman, 359 Mass. 127, 131 (1971). See United States v. Honneus, 508 F.2d 566, 570 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975).

We recognize that the prohibition against double jeopardy in the Fifth Amendment to the Constitution of the United States is applicable to the States. Benton v. Maryland, 395 U.S. 784, 794 (1969). If the defendant had been acquitted on either complaint, the judgment of acquittal, however erroneous, would bar further prosecution on that complaint; and dismissal of either complaint after jeopardy attached would commonly have the same effect as acquittal. Sanabria v. United States, U.S. , - (1978).[h] Since the Commonwealth does not now contend that the defendant can be retried on the charge of motor vehicle homicide by operating

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[g] Mass. Adv. Sh. (1978) 1162, 1164.

[h] 98 S. Ct. 2170, 2179-2186 (1978).

under the influence, we need not consider whether some exception is applicable to the dismissal of that charge. See Lee v. United States, 432 U.S. 23, 30-31 (1977) (dismissal in contemplation of second prosecution).

As to the charge of motor vehicle homicide by operating to endanger, however, it was clearly within the power of the District Court judge to anticipate what this court would do in the event of duplicitous sentences: dismiss one charge and affirm the sentence on the other. E.g., Kuklis v. Commonwealth, 361 Mass. 302, 309 (1972). By dismissing one charge and sentencing the defendant on the other, the judge accomplished exactly the same result. There were neither successive prosecutions nor multiple punishments. The sentence so imposed was valid, and would have been carried out without further proceedings if the defendant had not appealed. See United States v. Jenkins, 420 U.S. 358, 370 (1975). Gallinaro v. Commonwealth, 362 Mass. 728, 734-737 (1973), is not to the contrary; there one of two alternative punishments had been fully executed. If the District

Court sentence was valid, retrial in the Superior Court Department on the defendant's appeal is not barred. Ludwig v. Massachusetts, 427 U.S. 618, 630-632 (1976).

4. Disposition. The motion of the judges of the Superior Court to dismiss the action as to them is allowed. The case is to be treated as a proceeding against the Commonwealth. The judgment of dismissal entered by the single justice of the Appeals Court is vacated. The case is remanded to the Supreme Judicial Court for the county of Suffolk, where a judgment is to be entered declaring that the proceedings in the District Court do not bar further prosecution of the defendand in the Superior Court Department on the complaint for motor vehicle homicide by negligently operating to endanger.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Supreme Judicial Court
No. Civ. 77-408

THOMAS H. FADDEN, JR.

VS.

COMMONWEALTH OF MASSACHUSETTS

JUDGEMENT

This matter came before the Court on the Defendant's motion for Entry of Judgement in accordance with rescript of the full court entered on December 8, 1978, and the issues having been duly heard,

It is Ordered and Adjudged,

that the following entry of Judgement be, and the same is, hereby made:

"The motion of the judges of the Superior Court to dismiss the action as to them is allowed. The case is to be treated as a proceeding against the Commonwealth. The judgement of dismissal entered by the single justice of the District Court do not bar further prosecution of the defendant in the Superior Court Department on the complaint for motor vehicle homicide by negligently operating to endanger. Judgement for the

Commonwealth."

Dated at Boston, Massachusetts this 22nd day of December, 1978.

By the Court, (Quirico, J.)

John E. Powers
Clerk of Court

In the Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1189.

THOMAS H. FADDEN, JR.,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Respondent in Opposition.

FRANCIS X. BELLOTTI,
Attorney General,
BARBARA A. H. SMITH,
Assistant Attorney General,
Chief, Criminal Appellate Division,
Criminal Bureau,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

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THOMAS H. FADDEN, JR.,
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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Respondent in Opposition.

Jurisdiction.

Respondent challenges petitioner's claim of jurisdiction. Respondent suggests, and argues, infra, that the judgment of the Supreme Judicial Court is not a final decision within the terms of 28 U.S.C. § 1257(3).

Statement of the Case.

On October 23, 1976, four criminal complaints issued from the Third District Court of Eastern Middlesex County charging homicide by motor vehicle by negligently operating to endanger, speeding, driving to endanger and operating a motor vehicle while under the influence of alcohol. Later, a fifth complaint issued charging homicide by motor vehicle by operating under the influence of intoxicating liquor. All complaints arose out of the same incident.

The petitioner moved to dismiss the fifth complaint as duplicitous and as violative of the constitutional prohibition against double jeopardy. After trial on all complaints, the court ordered the fifth complaint dismissed and found the petitioner guilty on the other four complaints.

The petitioner appealed to the Superior Court for a trial de novo and moved to dismiss the complaint charging motor vehicle homicide on the ground that he had been previously placed in jeopardy. The motion was denied and the petitioner sought injunctive and declaratory relief. The Supreme Judicial Court held that the proceedings in the District Court did not bar further proceedings in the Superior Court. *Fadden* v. *Commonwealth*, Mass. Adv. Sh. (1978) 2830, 382 N.E. 2d 1054.

Reasons For Not Granting Certiorari.

I. The Decision of the Court Below is Not a Final Judgment Under 28 U.S.C. § 1257(3).

Following the finding of guilt on the complaint charging negligent homicide by motor vehicle and dismissal (not acquittal) of the complaint charging driving under the influence re-

sulting in the death of a person, the petitioner appealed and claimed a trial de novo.[1] In the Superior Court he advanced a plea in bar by way of a motion to dismiss alleging a violation of the Fifth Amendment prohibition against double jeopardy. The motion was denied. The petitioner then sought injunctive and declaratory relief in the appellate courts of Massachusetts pursuant to Mass. Gen. Laws, c. 211, § 3, and c. 231A. The Supreme Judicial Court found nothing improper in the District Court proceedings and entered an order declaring that the proceedings in the District Court did not bar further prosecution in the Superior Court on the complaint for motor vehicle homicide by negligently operating to endanger. Such interlocutory rulings in criminal cases have traditionally been viewed as lacking the finality necessary to support review by this Court. *Chapman* v. *California*, 405 U.S. 1020 (1972); *Eastman* v. *Ohio*, 299 U.S. 505 (1936). Such has been the case even where no significant question of fact or law remains for trial. E.g., *Chapman* v. *California*, *supra* at 1025 (Douglas, J., dissenting). But see *Harris* v. *Washington*, 404 U.S. 55 (1971).[2]

Abney v. *United States*, 431 U.S. 651 (1977), does not compel a contrary result. *Abney* merely held that a federal court's

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[1] Certiorari does not lie from a judgment of the district or first tier court. *Costarelli* v. *Massachusetts*, 421 U.S. 193 (1975); *Whitmarsh* v. *Massachusetts*, 421 U.S. 957 (1975).

[2] *Harris* is distinguishable on the merits. Harris had been acquitted. The State then attempted a second prosecution which would have required relitigation of the same ultimate fact determined adversely to the State in the first trial. In the instant case the petitioner was not acquitted; the complaint was dismissed. It is the petitioner, not the State, who claimed a second trial; and the ultimate fact to be litigated is whether the petitioner recklessly or negligently operated a motor vehicle and by such operation caused the death of another person. The ultimate fact to be proven on the complaint which was dismissed was whether the petitioner operated a motor vehicle while under the influence of intoxicating liquor resulting in the death of a person.

pretrial denial of a motion to dismiss on double jeopardy grounds was a final appealable decision within the meaning of 28 U.S.C. § 1291. To have held otherwise would preclude a defendant from any appellate review of his claim prior to trial. However, Massachusetts has provided review of that claim and it is petitioner, not the Commonwealth, who has sought a trial de novo, thus utilizing a procedural two-tier system which has been held not to violate the prohibition against double jeopardy. *Ludwig* v. *Massachusetts*, 427 U.S. 618, 630-632 (1976).

Moreover, in *Abney* the Court was not called upon to consider the application of the principles of comity and federalism enunciated in *Younger* v. *Harris*, 401 U.S. 37 (1971), which preclude interference with ongoing good faith state criminal proceedings absent exceptional circumstances.

II. There is No Conflict Between the Decision of the Court Below and the Decisions of This Court.

Respondent suggests that several factual distinctions are present in the instant case which render distinguishable and inapplicable the decisions of this Court relied upon by the petitioner. In summary, the petitioner was brought to trial on all the complaints in a single District Court proceeding; one complaint was dismissed; the petitioner was found guilty on the remainder. Petitioner was not acquitted on any complaint; the petitioner was not given either concurrent or consecutive sentences on the allegedly duplicitous complaint; it is the petitioner, not the Commonwealth, who has appealed and claimed a trial de novo on those complaints of which he was found guilty.

As argued in the Commonwealth's *Opposition to Petitioner's Motion to Stay*, *Sanabria* v. *United States*, 437 U.S. 54 (1978),

is inapposite. Sanabria was charged in a single count indictment with violation of § 1955 in that he conducted an illegal gambling business, in violation of Mass. Gen. Laws, c. 271, § 17. The trial court concluded that evidence of numbers betting constituted only proof of a crime under Mass. Gen. Laws, c. 271, § 7, and not § 17, ordered the evidence of numbers betting excluded, and granted a judgment of acquittal. The government appealed, seeking a new trial on the portions of the indictment relating to the numbers betting. The Court of Appeals, viewing the horse betting and numbers allegations as "discrete bas[e]s of criminal liability," treated the District Court's action as a dismissal of the numbers activity and remanded for trial on that portion of the indictment charging a violation of § 1955 based on numbers activity. *United States* v. *Sanabria*, 548 F. 2d 1, 5, 8 (1st Cir. 1976). This Court reversed, holding that the single allowable unit of prosecution under § 1955 is participation in a single "illegal gambling business" (437 U.S. at 70). Therefore, a judgment of acquittal on the only count alleged is an absolute bar to any further prosecution. However, in the instant case, the complaint charging violation of Mass. Gen. Laws, c. 90, § 24G, by reason of driving under the influence was dismissed. Such a procedure is not an improper means for curing duplicitous complaints and cures any prejudice to a defendant by precluding the imposition of consecutive sentences. Double jeopardy principles are not involved. In *Simpson* v. *United States*, 435 U.S. 6 (1978), this Court held merely, as a matter of statutory construction, that "in a prosecution growing out of a single transaction of bank robbery with firearms, a defendant may not be sentenced under both § 2113(d) and § 924(c)." *Simpson* at 16. The procedure followed in the instant case is entirely consistent with *Simpson*. See also, *Lee* v. *United States*, 432 U.S. 23 (1977).

Therefore, respondent submits that not only was the procedure followed in the instant case consistent with the dictates of this Court, but, the constitutionality of the trial de novo system having been upheld (*Ludwig* v. *Commonwealth*, *supra*), petitioner has not presented a constitutional claim.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
BARBARA A. H. SMITH,
Assistant Attorney General,
Chief, Criminal Appellate Division,
Criminal Bureau,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-2240